UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

NATIONAL FEDERATION OF THE BLIND, on behalf of its members and itself, and HEIDI VIENS, * V. * SCRIBD, INC. * Case No: 2:14-cv-00162-wks

MOTION TO DISMISS
MARCH 3, 2015
BURLINGTON, VERMONT

BEFORE:
THE HONORABLE WILLIAM K. SESSIONS III
District Judge

APPEARANCES:
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(The following was held in open court at 1:30 p.m.)

THE COURT: Good afternoon.

COURTROOM DEPUTY: This is Case Number 14-162, the National Federation of the Blind and Heidi Viens versus Scribd, Inc. Present in the courtroom on behalf of the Plaintiffs are Attorneys Daniel Goldstein, Gregory Care, Emily Joselson, James DeWeese, Haben Girma, and Meghan Sidhu. Also present in the courtroom on behalf of the Defendants are Attorneys Gary Karnedy and Tonia Ouellette Klausner. The matter before the Court is a hearing on a motion to dismiss.

THE COURT: All right. We've reversed the courtroom just to accommodate counsel and the motion to dismiss filed by Scribd. Who is going to argue on behalf of the Defendant?

MS. OUELLETTE KLAUSNER: I will. Your Honor.

THE COURT: Okay. Welcome to Vermont.

MS. OUELLETTE KLAUSNER: Thank you, and let me say it's a pleasure to be here. I actually attended the University of Vermont and have not had an excuse to come back in over 20 years. So I very much appreciate the invitation to come up here and be with you all today.

THE COURT: There we are.

MS. OUELLETTE KLAUSNER: Here we are.

THE COURT: Right.

MS. OUELLETTE KLAUSNER: So everyone in the courtroom is familiar with the old adage that you can't fit a square peg

in a round hole and that's what this case is about. I represent Scribd Inc. Scribd is an online service. It's a digital publishing platform, and that service is not among or anything like the exclusive places of public accommodation listed by Congress in Title 3 of the Americans with Disabilities Act. Scribd operates software. Specifically they operate a web site and they offer software applications that people can download onto a smart phone or other mobile device.

THE COURT: Well essentially they are offering services, whether they are library services or generally speaking they are services to their potential customers.

MS. OUELLETTE KLAUSNER: Correct. They offer services. Yes. The Plaintiffs in their complaint refer to it as a reading subscription service and also an online publication service I believe. What Scribd --

THE COURT: I assume they must have some structure or building which is the center of their operations, is that fair to say?

MS. OUELLETTE KLAUSNER: They have an office. They have an office based in San Francisco. I have not actually been there, but my guess given the size of the company, they are very small, it's about 80 employees or 70 something employees, they probably rent office space in a shared building in San Francisco, but that office is a private office. That's not where the public can obtain their services. Services are

obtained over the internet exclusively or through these mobile software applications that are downloaded to a phone.

So Scribd doesn't -- it doesn't operate any of the places identified by Congress in the statute, and we've quoted the pertinent language in our opening brief on pages 4 and 5. Scribd doesn't operate in a hotel, motel, or other place of lodging. Doesn't operate a restaurant, a bar. Other establishments serving food or drink. Doesn't operate a motion picture house, a theater, a concert hall, a stadium or other place of exhibition or entertainment, and I can go through all 12 categories.

THE COURT: Sure. I have read your pleadings. Your argument is that the ADA requires that there be a physical place which is the source of the discrimination.

MS. OUELLETTE KLAUSNER: Well the discrimination can be in the product or service that is being offered, and that could be a product or service that is offered at the physical place of public accommodation or it could be offered in a different means like over the phone or over the internet, but the first question in a Title 3 claim is whether the service itself is a covered entity. Is it the owner, lessor, lessee, or operator of a place of public accommodation, and numerous courts have held that a place of public accommodation, so the entities that are covered by the statute, are limited to entities that operate actual physical places where the public

can enter and obtain those services.

That's based on a plain language reading of the statute and it's also based on the Department of Justice's regulatory definition of place of public accommodation. The Department of Justice when it first issued its regulations defined place of public accommodation as a facility. That's a physical structure. It went on to define facility as any or all of the portions of the buildings, structures, sites, complexes, equipment, et cetera. Clearly indicating a physical place.

THE COURT: Okay. So you dispute the Plaintiff's assessment or interpretation of DOJ's position that the internet is covered by the ADA which is essentially, they have suggested, been the case since 1996 when -- I can't remember who it was who testified before Senator Harkin, but DOJ representatives have consistently over the years suggested apparently, according to the Plaintiff, that the internet is covered by the ADA.

MS. OUELLETTE KLAUSNER: We do dispute that. The Department of Justice's position today that it has taken in amicus briefs and other -- outside of its regulations themselves is that the internet web sites are covered that -- but that's not a consistent position. It's directly contrary to its official regulatory --

THE COURT: Is it true that DOJ is actually considering regulations to make that very clear that the

internet is in fact covered by the ADA currently? Aren't they in the process of developing regulations which basically codify the position that they have taken over the past at least decade?

MS. OUELLETTE KLAUSNER: Well they definitely are contemplating regulations that would talk about what is required to make a web site accessible. Now there are web sites that are now even under the law in the Third Circuit, Sixth Circuit, Ninth Circuit, Eleventh Circuit, all of the places that have said you have to have a physical place that's operating the public accommodation. There are instances where a web site would be covered because if it's a web site of one of those places, it would be covered by the ADA even under those state's -- interpretation of the statute.

So what the Department of Justice's regulations, as I understand them, they have issued an advanced notice of proposed rulemaking saying we are contemplating what regulations might look like with respect to how to make a web site of a covered entity accessible, and they are seeking comment on that, including comments on whether entities like Scribd that are teeny tiny companies, start-up companies that don't make any money should be covered.

THE COURT: You're in Vermont. An 80-person business is one of our leading industries.

MS. OUELLETTE KLAUSNER: Okay. Well in any event --

THE COURT: I appreciate the fact that you may think it's small, but here it's not.

MS. OUELLETTE KLAUSNER: In any event, the Department of Justice one of the things they are considering is whether businesses of a certain size or a certain revenue should be exempted from the statute. So yes they are considering things, but those things are just being considered. They haven't been enacted, and I would like to go back and make a point about the question asked earlier about whether, you know, the statute was passed in 1990. Has the Department of Justice since 1996, six years later, taken this position? No. The letter that Plaintiffs cite to from 1996 talks about whether a covered entity, so a place of public accommodation, must offer communication services over -- if they offer them over the internet whether they need to be accessible. They did not address the very different question of whether a purely virtual business with no nexus to any physical place that people can go to, to get the services is itself covered, and the Department of Justice itself has said that and we've cited that in our reply brief where the Department of Justice referred to the letter that the Plaintiffs put forward here and said in that letter that issue -- the letter does not address whether an entity doing business exclusively on the internet is an entity covered by the ADA.

THE COURT: Well so the word nexus is confusing to me

in this particular context. So what you're suggesting is as long as there's a sufficient nexus to a physical property then of course ADA would apply.

So how do you take -- if that's the case how do you take a case like Pallozzi, which is the Second Circuit case law, which suggests that the physical property is not particularly important the service is important, and in fact they ruled that that sale of insurance which was not -- which was not in response to a physical entry into a building but done over the telephone or by wire, et cetera, is covered?

MS. OUELLETTE KLAUSNER: So --

THE COURT: Essentially what the Second Circuit has said is that is sufficient nexus to have ADA apply.

MS. OUELLETTE KLAUSNER: So in the Pallozzi case the Second Circuit did not address the issue that's before the Court here. So the Second Circuit was addressing whether insurance purchased from an insurance office but not physically at the insurance office could be subject to a Title 3 claim.

The Court first said -- well first they asked a question whether insurance at all was regulated under Title 3, and the Second Circuit said yes it can be. The fact that Congress included insurance office among the places of public accommodation subject to the Act means that yes, you know, subject to the safe harbor provisions elsewhere in the statute insurance can be regulated under the statute. It is regulated

under the statute.

The second question, though, was not whether Allstate was a place of public accommodation. Nobody disputed that Allstate was an operator of insurance offices, which is a specific entity listed in the statute as a place of public accommodation. The question was once you have a covered entity is does the statute come into play if the services of that entity are purchased over the phone as opposed to purchased in the office itself. Allstate argued that the Title 3 only comes into play with respect to goods and services that are used within the place of public accommodation itself, and the Second Circuit correctly read the statute as saying no. The statute talks about the goods or services of a place of public accommodation, not goods or services used in a place of public accommodation.

THE COURT: So what you're suggesting is the Second Circuit was just saying that if in fact the insurance policy was drafted in a particular building but then was contacted by the -- was obtained by the customer by way of the telephone or some other avenue that that's sufficient?

MS. OUELLETTE KLAUSNER: Right. It's not just that it's a building. It's a facility that falls within one of the categories of public accommodations identified by Congress. So it's not any facility. It is a facility, a concrete place where the public can go to and where there are the goods

identified within the places of public accommodation in the statute.

Once you have that first step so we know we're talking about a place of public accommodation, then the question that the Second Circuit was addressing in Pallozzi is well do you actually have to physically walk in the building and purchase the goods and services in the building or does the statute apply even though the services are purchased from without or access from without, and that's consistent with all the other cases that we cited in our brief.

THE COURT: What do you think about Judge Posner's assessment of public accommodation focusing in particular upon the word of and then listing the public accommodations in one of his two opinions in which he says the web or the internet is in fact public accommodations.

MS. OUELLETTE KLAUSNER: Judge Posner did say that in the Doe versus Mutual of Omaha opinion, however, that was not the issue before the Court. I believe it's the second paragraph of the case where he's reciting background and wasn't getting at the actual issue in the case. The issue in that case was whether the Title 3 regulates the content offered by a place of public accommodation.

THE COURT: But the fact is Judge Posner actually found that the internet, which is essentially the same issue here, the internet was in fact public accommodation. I mean he

used that language.

I appreciate the fact you're arguing that's dicta and was not central to the case, but this is Judge Posner. Has a fairly wide and -- wide reputation would be fair to say, and he is in the forefront of stretching the ADA to accommodate to the changes in business over the past couple of decades by using language by that. Do you dispute that?

MS. OUELLETTE KLAUSNER: With all due respect to Judge Posner, and he's a well esteemed judge, I have a lot of respect for him, in this case it's our view that he didn't actually find that a web site was a place of public accommodation. He listed it. He said it, but there was -- the entity involved was an insurance company.

So this again was not -- there was no -- the Defendant was not a virtual business. That wasn't what he -- the question he was addressing. He listed it. He cited the Carparts opinion suggesting that if it were up to him he would agree with what Carparts has also said in dicta, but the issue is not before the Court.

On the other hand, the issue has been squarely before the Third Circuit, the Sixth Circuit, and the Ninth Circuit. All of those courts have been specifically and squarely presented with the question.

THE COURT: What's interesting about the Sixth Circuit cases, in particular Parker, all involved customers who

actually obtained policies through their employer not directly from the insurance company, and so therefore there is theoretically an argument to be made, which I'm sure that you recognize, that there's insufficient nexus because there's a third party which gets in between the seller of the insurance policy and the customer.

Isn't -- aren't the Sixth Circuit cases involving employers who are actually providing the insurance policy coverage?

MS. OUELLETTE KLAUSNER: There -- one of the Sixth Circuit cases we cited was involving insurance coverage.

THE COURT: Oh I thought both of them were.

MS. OUELLETTE KLAUSNER: The Statenborough case. So there's -- there's four.

THE COURT: I thought the Parker and the Statenborough cases both involve employers, employer providing the insurance coverage, and so therefore there's necessarily a break in the nexus between the customer and the insurance company, isn't there?

MS. OUELLETTE KLAUSNER: So the Statenborough case was not about insurance at all. The Statenborough case raises --

THE COURT: Well maybe it's not the Statenborough, but it was the other Sixth Circuit case I had thought, but correct me if I'm wrong.

MS. OUELLETTE KLAUSNER: There's the Fourth Circuit case and a Third Circuit case that address insurance provided by an employer and they both adopt the nexus approach saying that because the insurance was purchased not from the insurance office, which would be a place of public accommodation, but from the employer, which is not, there wasn't a sufficient nexus to a place of public accommodation which has to be a physical -- those cases say it has to be a physical place somebody goes to, to purchase the product.

The Statenborough case, though, if the Court has not focused on that case, it's worth reading it very carefully. There you had a service that was much more akin to the service that's offered by Scribd. So TV networks offering TV programming. These were sporting broadcasts and what the Court there said is, you know, we're looking -- they looked at the categories of public accommodations and said these just -- this -- these media services are not listed. Congress didn't include services like that. The District of D.C. did the same thing in the case against the Washington Post. So you have a case that says television networks are not subject to Title 3 of the ADA. They are not like any of the physical places where people go to get these types of services.

A newspaper is not a place of public accommodation even though it clearly is a good provided to the public and it provides information and entertainment. It is the operator. A

newspaper publisher is not a place of public accommodation.

There's another case from the Northern District of California that says the provider of digital subscription TV cable programming is not subject to Title 3 of the ADA. Again because this is a media company that is providing content to people in their homes or in a bar or a restaurant or a hotel, but somewhere that is not a place, a physical facility, operated by the Defendant. It's provided somewhere else and those are -- these courts have all found that those are very different circumstances.

Congress did not -- there's no indication from the statute that Congress meant to cover any of those businesses. In 1990 there were magazines, there were book publishers. These are not new things. There were television networks. None of them is listed in the statute because Congress intended to cover facilities that people go to.

That's not to say Congress only meant to provide physical access, that's a different question, and the Second Circuit has said no the ADA provides more than physical access. If you are a place of public accommodation, then you need to make your goods and services equally available regardless of how they are provided.

THE COURT: So do you find it a little bit incongruous to think that under your theory of place of public accommodation there has to be a building, a structure, that's

available for public entry, and if you have one of those, whatever services you provide are subject to ADA regulation when in fact if by chance you decide not to have a building which is open to the public, then whatever services you provide are not subject to ADA regulation or control.

MS. OUELLETTE KLAUSNER: I don't think --

THE COURT: Don't you think that logically is inconsistent?

MS. OUELLETTE KLAUSNER: No I don't because I think if you look at the statute, it's very clear that Congress wasn't trying to regulate every single American business that affects commerce and offers a service to the public, right. If that's what Congress wanted to do, you wouldn't need this; all these pages, right.

Congress would just say Title 3 of the ADA applies to any business that affects commerce and offers a good or service to the public. Period. That would have been very, very simple. Obviously Congress didn't do that. Congress very carefully listed very specific categories of places that are all physical places open to the public.

THE COURT: And Congress also indicated during the course of passage of ADA in 1990 that this was to be a flexible particular document. That as technology changes over the decades this is a protection for disabled people which is extremely important, and there should be some flexibility as

time evolves when changes in technology suggest that there's different modes of distribution.

MS. OUELLETTE KLAUSNER: So --

THE COURT: Doesn't it? Didn't they say that?

MS. OUELLETTE KLAUSNER: They did, but what Congress was referring to there was the goods and services and the aids that would be provided by the entities. Congress did not say that these specified and what Plaintiffs have recognized it's an exclusive list of 12 categories. Congress didn't say that Courts or the Department of Justice or anybody could expand that list. The list is the list. That's what the law is. What Congress said is the types of technologies that can be provided to persons with disabilities should develop as technology develops. It's a very different question.

So I did want to just raise the question sort of big picture why are we here, right. This is you have a company that's based in California. If the Plaintiffs had filed suit against Scribd where it's located in California, there's no question that the complaint would have been dismissed. It would have been dismissed if they had filed suit anywhere in --

THE COURT: Because the law in the Second Circuit is different than the law in the Ninth, is that what you're suggesting?

MS. OUELLETTE KLAUSNER: Well I'm suggesting --

THE COURT: Because we are in the Second Circuit.

MS. OUELLETTE KLAUSNER: Correct. We are in the Second Circuit and the Second Circuit has yet to address this issue. This is a case where the Plaintiffs are trying to change the law. They are trying to get a different outcome than they would get in virtually anywhere else in the United States and not because Second Circuit requires that. I mean Pallozzi did not address this issue and it said insurance office is listed it's a place of public accommodation. There was no purely virtual business before the Court. It was a different question.

Now they are trying to change the law and they are trying to create a split within the Circuit. Shortly after the statute was passed the Eastern District of New York Judge Gleeson, very respected judge in the Eastern District, looked at the statute, considered the Parker case, considered the Ford case, and considered the Carparts case.

THE COURT: This was before Pallozzi was decided.

MS. OUELLETTE KLAUSNER: Correct.

THE COURT: That was before Pallozzi was decided.

MS. OUELLETTE KLAUSNER: Correct. That was before Pallozzi was decided, but he followed Parker and Ford, and Pallozzi in footnote -- I believe it's footnote four, the Second Circuit went out of its way to say what we're doing here is not inconsistent with those decisions. Those were -- those decisions, Ford and Parker, were addressing a different issue

and that the Court there said -- I want to see if I can find the quote here -- said Pallozzi and Ford quote "are not to the contrary."

So the Second Circuit was not trying to create a split among the Circuits. The Second Circuit was trying to decide the specific issue presented before it without creating that split.

THE COURT: And remind me when the Second Circuit in Pallozzi said we are not overruling at least -- not overruling Parker or Ford, but weren't they talking about the fact that in Parker and Ford the employer was in fact the distributor of the insurance policy and wasn't that discontinued in Pallozzi?

MS. OUELLETTE KLAUSNER: Well in the footnote where the Second Circuit addressed Parker and Ford, the Second Circuit references the fact that those courts had adopted the nexus approach, and so that the service at issue or the good or service at issue is being challenged, is discriminatory, has to be offered by an entity with a nexus to a physical place open to the public, and the Court went on to say here that nexus exists because the Plaintiff had purchased their insurance directly from Allstate.

THE COURT: You know I mean just logically it seems to me that if the ADA was just protecting disabled people from dangerous circumstances in a physical plant I would understand your argument, but when in fact you just say that's a threshold

that there has to be some sort of physical building, and that once you have reached the threshold there's a physical building, then the product itself is governed by ADA. It's a logical inconsistency. I mean if the ADA just dealt with, you know, whether the stairs complied with regulations, that's one thing. I would understand that, but if this is just a threshold and then the courts are obligated once a threshold is met to look at the product itself, it really -- the idea of just having a building makes no logical sense, does it?

MS. OUELLETTE KLAUSNER: Well it's not so much a building, it could be an outdoor exhibit, it could be an amusement park, it could be a beach, it could be a tennis court. So -- but it is a physical place that people go to and it comes --

THE COURT: Why is that important? Why is the physical place important if in fact what the ADA is ultimately doing is controlling or defining or regulating the safety or the provisions made or services made in a product? Who cares about the physical building?

MS. OUELLETTE KLAUSNER: Because it was also -- I mean quite a bit of the ADA was about physical access to buildings. It was not limited to that, but it was about that, and if you look at the -- if you look at the Department of Justice's regulations about barriers which Plaintiffs are invoking here, they are all talking about architectural barrier

within a physical building or structure, and this is just from the language of the statute.

I can't speak to Congress's motives, but Title 3 says that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by a person who owns, leases, leases to, or operates a place of public accommodation.

So Congress was directing the statute at two requirements. There has to be somebody who is operating, owning, or leasing a place of public accommodation, and then the statute applies to that entity and it prohibits the operator of that facility from discriminating in whatever goods and services it's providing.

So it's based on the language of the statute. At the time the statute was passed the internet was not in wide use so Congress wasn't thinking about the internet. Web sites are not mentioned in the statute. They are not mentioned in the legislative history. The Department of Justice has recognized that it's not something Congress was thinking about, but it's very important to note Congress, that is, thought about the internet in Title 3 since the statute was passed. Congress amended the Rehabilitation Act in order to specifically have it cover web sites.

THE COURT: You're suggesting because they amended the Rehabilitation Act to make the internet applicable to the

Rehabilitation Act and they didn't do that with the ADA then of course they must have intentionally decided not to have the ADA cover the internet, but in fact Congress had been given at least that letter in 1996, and the Department of Justice had been arguing for a decade at least that in fact the internet was covered by the ADA. So it's not like they would have thought oh it's clear that the ADA does not cover the internet.

In fact, what seemed to be the thrust of the debate in Washington was that in fact the internet was covered by the ADA. So why -- why go back to the ADA and change the law if in fact the Department feels the ADA covers the internet. There is some case law in the First Circuit and now the Seventh Circuit and some could argue in the Second Circuit that the ADA covers the internet. So why change it?

MS. OUELLETTE KLAUSNER: Well it wasn't just that Congress amended the Rehabilitation Act. It's that Congress also has amended the ADA. Congress amended the ADA to address the fact that courts initially when they were interpreting the term disability had been interpreting it in a very narrow way that Congress had not intended. At that time these cases, the Parker case, the Ford case, they had all already been issued. There was a clear body of authority that said a place of public accommodation is limited to a physical place open to the public. That was brought to Congress's attention so they went ahead and amended the statute to address one concern that had

been raised about how courts had been interpreting the ADA and they did not address the other one, and there are cases that we cited in our brief that were the Second Circuit that said that's something that's worth noting. It does suggest that Congress meant to leave the law the way that it had been interpreted at that point in time.

THE COURT: So what did you think of Judge Ponsor's decision in the Netflix case and why is that not good guidance for the Court in this particular case?

MS. OUELLETTE KLAUSNER: So Judge Ponsor I believe thought he was bound by Carparts. Carparts actually did not actually hold that a purely virtual business or a business that doesn't have a physical facility that's open to the public is a place of public accommodation. The First Circuit in Carparts said, first of all, they said this case needs to be reversed because the Court dismissed an amended complaint without giving the Plaintiff notice and opportunity to be heard. That was the actual holding of the decision.

The Court went on to provide what it called guidance to the District Court, and it did say that we don't think that it's necessarily the case that places of public accommodation are limited to a physical structure. That was dicta.

Judge Ponsor felt bound by those statements, and with respect to the first -- I'm sorry, to the District of Massachusetts he just got it wrong. I mean he considered the

statutory canon that says where you have a term that indicates another type of something that you have to construe it to be similar to the things that precede it. He recognized that was a canon, but then he just completely disregarded it because he said but these are services of the place of public accommodation. The two things just don't logically flow. It doesn't answer the right question.

There is that one case out there. There's the first -- I'm sorry, the District of Massachusetts has said that a purely virtual business Netflix, which has a video streaming business that, you know, could be analogized to Scribd's business, they said it's covered by the ADA. That's the only case in the country that has ever said that.

Like I started off saying, if this case had been brought in the Third Circuit, the Ninth Circuit where Scribd is located, in the Sixth Circuit, in the District Courts in Montana, the District of D.C., the Eastern District of New York, all of those courts would say that Scribd is not as alleged in the complaint a subscription online digital reading service, is not a place of public accommodation. It's not a place of public accommodation both because its service just really isn't like any of the things that are listed in the statute. It's more like a newspaper or a magazine publisher, but also because it doesn't operate, there's no allegation in the complaint that it operates a facility, that's the term used

by the Department of Justice, and in its official regulations which remain on the books today it doesn't operate a facility where people can go and obtain in-services. Thank you.

THE COURT: All right. Thank you.

MR. GOLDSTEIN: Good afternoon, Your Honor. I think I should start by putting on the record that this morning in a Supreme Court case called Direct Marketing Association versus Colorado Department of Revenue, Justice Kennedy in a concurring opinion, and indeed what is clearly dicta but dicta I thought was worth bringing to the Court's attention --

THE COURT: It was a totally different issue. I mean I read that particular concurring -- or even that section of the concurring opinion. It is dicta, but it is really talking about how the internet is changing the world of business.

MR. GOLDSTEIN: That's correct, Your Honor, and the fact that the internet has afforded people without disabilities such extraordinary access to a variety of goods and services, some of which can only be available on the internet even if they are the traditional kind that are listed in 121817. For example, what you can't do at a physical travel service which you can do at Kayak is compare 15 different hotels and the prices that five different people offer those same hotels at. This is -- this is a new kind of access to information, exchange of information, and some of these establishments really can only be accessible to people with certain

disabilities by virtue of being on the internet.

Scribd is a great example of this. Can you imagine housing four and a half million pieces of textbooks and books and articles --

THE COURT: 40 million.

MR. GOLDSTEIN: Sorry.

THE COURT: I thought it was 40 million.

MR. GOLDSTEIN: I don't usually get accused of understatement, but I think I just did. 40 million. Which if they have access to would make their blindness irrelevant with respect to a massive quantity of information.

THE COURT: Let me ask you to respond to the representation that the Ninth Circuit has said there needs to be a physical place, the Third Circuit has said there has to be a physical place, the Eleventh Circuit says there has to be a physical place. Is that right?

MR. GOLDSTEIN: Well they certainly have, and I would pose the question to the Court that the Court needs to decide this way. Let's assume the Third, Sixth, and Ninth Circuits came up with a reasonable interpretation of Title 3, and let's suppose also Judge Posner and the Court in Carparts came up with a reasonable interpretation. What is the Court's duty if the term is ambiguous? That is to say there are at least two reasonable interpretations, and we're very fortunate that we have Supreme Court guidance on how to interpret 12187 because

in PGA versus Martin what the Supreme Court said about the particular section that you're being asked to construe today was that the phrase public accommodation is defined in terms of 12 extensive categories, which the legislative history indicates should be -- I'm quoting here directly -- "construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the non-disabled."

Now what I suggest that instruction of liberal construction means is if we go, as I propose to in a minute, to the analytical framework of Robinson versus Shell Oil Company that you used in Conservation Law Foundation and cited by the Defendant in this case, to look at whether place of public accommodation is ambiguous, if you conclude it is because you've got some very smart Circuit Court judges on both sides of this issue, then your obligation I suggest is to carry out the Congressional intent to have the ADA be a clear and comprehensive mandate, and the Congressional intent that 12187 was designed to be very elastic to cover future changes as you suggested with the statutory history.

I think we need to be clear, though, about what the construction task is, and if I may, Your Honor, I would suggest that Scribd has taken the position that there are two qualities to the word place that they would like you to insert that are not either inherent to the word place nor are they implied by

the context. One is the word physical and one is the word public, and they want both of those because if only one of those is implied, let's say it has to be a physical place, then as you raise the question don't they have an office, yes but the office is not public, or if it doesn't have to be public but can be -- excuse me, that was public. If it doesn't have to be -- if it can be virtual, then again they lose. So it has to be both physical and public in order for Scribd not to be the kind of library service or sales and rental establishment that is covered by the term. So in essence our position is if there's a jump ball the possession arrow goes to the Plaintiff.

Why do I say that they insist on both? If you look just at the preliminary statement from their opening brief, they say Scribd operates no physical facility open to the public. They describe Scribd's lack of a physical public facility, and they say at the end of their preliminary statement Title 3 does not apply to those whose goods or services are not made available to the public through a physical location open to the public, but physical and public are neither implied nor stated, and what they are seeking to have you do is to come up with a craft definition by extending the scope of the word place to incorporate those two --

THE COURT: So if the word physical applies, what you're suggesting there is a building, the building in San Francisco. The building in San Francisco houses the computers

they work on which create the access, the web sites, et cetera, and that that is a sufficient nexus if it's just physical, but it also has to be public. That's what --

MR. GOLDSTEIN: They are saying it's not enough it's physical it has to be public, or conversely that at least it has to be -- well yes it has to be both.

One of the interesting things when we look at the way the terms are used in the statute is that it's not a prohibition of discrimination by places of public accommodation, but merely prohibition of discrimination by public accommodations. The word place then appears in the description, and I'm going to suggest that that is descriptive rather than limiting language, and the reason I would suggest that is if we also look at the definition of public accommodation, we again see what they are defining as public accommodation, and the place appears in an interesting place so to speak. It appears when Congress is trying to expand the definition. The word other proceeds its use over and over again, but the other interesting thing is Congress doesn't consistently stick with the word place. Sometimes they say establishment, and we don't want to hang too much on a single word.

I was thinking about this last night. When else has there been a significant construction of the word place, and of course the answer is the Fourth Amendment Katz versus United States. Very famously. The Fourth Amendment protects persons

not places, even though what is talked about and presumably Congress wasn't thinking about wire taps and recording -- not Congress rather but the radifying states weren't thinking about recording oral conversations when it said that a warrant has to particularly describe the place to be searched and the persons or things to be seized when the thing to be seized was intangible, oral conversations, and there was no place to be searched because if you remember Katz, the big jump was from the microphone and how far did it penetrate into the wall of the adjoining hotel room, to not being in the phone booth at all, and it was something intangible that was being protected despite that language.

Well I think here too when you look at what did Congress intend by public accommodations, and here I can agree with Ms. Klausner, they weren't trying to say that newspapers, I don't -- newspapers are physical by the way, but newspapers are a place of public accommodation because that's not one of the services that's listed here.

MS. OUELLETTE KLAUSNER: I'm sorry. Can I interrupt for a second? We don't have access to it.

MR. GOLDSTEIN: I'm terribly sorry. Let me show you, I have the text of 121817 public accommodation, with the Court's indulgence.

MR. KARNEDY: Sorry, Your Honor.

MS. OUELLETTE KLAUSNER: I just needed to see what he

was showing to the Court. Thank you.

THE COURT: He was not trying to express a subliminal message.

MR. KARNEDY: There we go.

MS. OUELLETTE KLAUSNER: Just being careful. That's what lawyers get paid to do.

THE COURT: I understand.

MR. GOLDSTEIN: One of the interesting things, and I don't quite have it on the screen, is H; a museum, library, gallery, or other place of public display. Now if place imports public you wouldn't need to say public display, right? It would be a place of display because everybody knows a place means a public place, and having the word public appear only in front of accommodation doesn't imply anything about the place, and that's simply demonstrated if you just reverse the words that there shall be no discrimination at a public place of accommodation. That doesn't mean anything.

Public accommodation is a compound noun that talks about places that -- and Pallozzi got this right. That it's about delivering certain kinds of goods and services, advantages and benefits to the public. That's what this provision is all about, and that's why the Seventh Circuit got it right and that's why the First Circuit got it right.

THE COURT: And you're suggesting the Second Circuit got it right?

MR. GOLDSTEIN: Yes. I mean I -- I thought -- well it doesn't make sense for the Second Circuit to say what it did, and it didn't say with all respect that Allstate has a bunch of insurance offices. It said we don't care whether it's an insurance office or an insurance company. Looking at the kind of services and given that what's protected here are the services of certain kinds of a public accommodation, Allstate you're covered by the ADA, and to draw the line as Scribd would have it, it draws a line that requires you to construe the statute in a way that makes no sense because as Scribd would have it if a company sells life insurance door-to-door, and when I was growing up that's the way a lot of life insurance got sold and got paid for each week, then there's no public place of accommodation from the perspective of Scribd and they can discriminate, and if Allstate simply goes entirely to its subsidiary esurance and becomes a virtual company, it and every other insurance company can escape the confines of the ADA or they can do it low tech and simply sell insurance over the phone like a lot of folks do.

THE COURT: So why did not -- why did Congress not deal with this particular issue? They were concerned about the Rehabilitation Act and whether the Rehabilitation Act was going to be covering the internet. Why at that same time did they not deal with ADA?

MR. GOLDSTEIN: Well they were dealing with -- with

an entirely different issue with 508 that I don't think -- I don't quite figure out how you would do it in the ADA context. Let's be clear. Section 501 with respect to federal employees and 504 of the Rehabilitation Act with respect to any entity that receives federal funding is forbidden from engaging in any program or activity that discriminates on the basis of disability.

So that means what we already know which is if you get money from the Feds or if you are the Feds, you can't go out and have a web site that's inaccessible. 508 dealt with a very different issue. 508 deals with federal government procurement with respect to electronic technology, electronic information technology, and what 508 instructs, and I hope some day the federal government decides to observe it, but what 508 instructs is buy accessible. Feds buy accessible. Don't go out and buy phones with soft buttons that is needing changes depending on what's on the screen of your phone. Don't go out and use Google Docs for your employees so that they can't -- the blind employees can't know what's going on in the office when they try to collaborate.

508 is directed to federal procurement and one perfectly good reason for the federal -- for the Congress never to have amended the ADA is that it didn't need to. It thought it had, and I suggest it did, create a comprehensive mandate that was intended to be flexible over time.

So if -- and I mentioned Robinson before and Conservation. You look at the term itself, you look at the context in which it's used, and then you look at the overall statute, and if it's still ambiguous, then you can look at legislative history. The term I suggest is ambiguous because of the split in the Circuits because it requires inferring physical and public when that's neither necessary for in furtherance of the purpose of the statute.

I also would suggest that when you look at common usage we can't talk about the internet without using the language in place. We visit a web site. We don't visit a television station or a newspaper. We listen to the or watch the television station and we read the newspaper, but we visit a web site. When the Burlington Free Press tells those who want to know how to help rebuild the Green Mountain Club in the wake of its fire visit the club's web site, I don't think the Burlington Free Press is being poetical and metaphorical. That's the language we all understand. We visit a web site. We don't speak of cyber. We speak of cyberspace. We talk in chat rooms. We post news on Facebook walls. We have e-mail addresses. We shop at online stores. When the Times Argus says in 2001 the internet is not just a place but lots of places, again I don't think they are being metaphorical. That's language we all understand it and we understand it the first time we hear it. We understand web site. That's a web

place in the common understanding of the word site.

Scribd itself in its history, and we just put this in our brief, describes itself repeatedly as a place and they try to dismiss that as metaphor. Metaphor is the former Governor of Oklahoma writing you are my sunshine my only sunshine addressed to somebody who is not the sun and doesn't radiate light. This is not a metaphor. It is really hard if you take just one of the statements we quote, Mr. Adler's statement that Scribd is the place where connections form around sharing reading interests.

THE COURT: That may be the common meaning, but the problem with that argument is that this statute was passed in 1990. The question is what did place mean at the time of the passage of the statute in the first place, and if in fact Congress at that point felt that there should be this physical property threshold to the application of the ADA, then they must have been talking about something other than the internet. They must have been talking about some physical building --

MR. GOLDSTEIN: If they were --

THE COURT: -- location.

MR. GOLDSTEIN: If they were, then again the question is they are talking about a public building, but also why then do they abandon the word place in the oddest places. They use establishment instead of place. They define public accommodation but not place of public accommodation, although

the regulations do, and I'll address that in a minute. Why don't they use it in the heading of the statute that is the core of Title 3 defining what's prohibited, and it's because place is not an operative word. It's a descriptive word, and one way to see that is when you try to change, for example, a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment, if you want to use place you have to say or other place. I think you have to say or other place where sales or rentals occur or something. I mean it's too clunky. They weren't trying to -- to limit something. They were just trying, whether they used place or establishment, to describe something, and they used it over and over again when they are saying or other to make it as broad as they knew how to do using the English language, and knowing that they lived in an age of technology where -- which they acknowledge in the statutory history which was going to affect the way the ADA worked.

I'm not going to talk about the context because we've already talked about Pallozzi. I think of the place is the context. I just want to point to one oddity in terms of the kind of arbitrary lines you would have to follow if you insisted that it be a physical public place.

In 1931 the Pratt-Smood Act established the National Library Service for the blind and physically handicapped, and the blind don't come to Washington to get their books. They

are sent them and the notion that well if there's no public reading room then there's no public accommodation really -- it really wouldn't make much sense in terms of what the statute is designed for.

I also would point out given the sort of all that we're trying to put on the word place it was interesting the quote from Martin about construction. It talks about the wide variety of establishments. Even the Supreme Court did not feel the need in describing 12187 to talk about place.

Now we've heard from Scribd that facility as it's defined in the regulations is a limiting factor. Place of public accommodation is defined in the regs as a facility and facility in turn is defined, and I think it's interesting, first of all, facility means all or any portion of buildings, structures, sites, et cetera, that I think throws a lot of cold water on the notion that the place needs to be a public place. That Scribd's offices don't do the trick, and all or any is again the most broad possible language, and to get to where Scribd wants you have to read all or any to be any public portion and skip the all or any, any public portion of any, and it's simply not implied, but the other thing is that if you go on and read the definition further it covers personal property. Not tangible personal property. Facility even covers personal property, which I would suggest a web site is, and it also covers equipment which servers most certainly are -- computer

servers most certainly are.

So there's nothing really about facility that knocks us out of the ball park. To the contrary.

THE COURT: Well even -- even if the internet did fall within the language or within the meaning of facility, what you're suggesting is when you use facility and say that also includes equipment or things other than a physical building, what you're suggesting is that it's a much broader concept than just a physical building which is open to the public, which is I think the argument that the Defendant is making.

MR. GOLDSTEIN: That's correct, Your Honor. Finally Robinson and Conservation Law tell us to look at the statute as a whole. If you look at the statute as a whole, we look at the findings and purposes of the ADA, and those findings note that what prompted the statute was that persons with disabilities are being denied the right to fully participate in all aspects of society, including discrimination in public accommodation and in communication, and noted the discriminatory effects of communication barriers. By the way barriers is another interesting word because that's what we're complaining about here and I guess that imports physical, but it need not.

And then the purpose section says that the ADA is to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities. So

when we see the purpose and we remember that we've been told since Tcherepnin versus Knight that remedial statutes are to be broadly construed, I think what Scribd has to do is convince you that the only possible interpretation is the place means a physical public place because if not, then construing it liberally in line with its remedial purpose requires concluding that place does not necessarily require those categories and that they are included. If the Court will indulge me just one moment.

THE COURT: Yes. Okay.

MR. GOLDSTEIN: You had posed the question to Scribd about how Pallozzi distinguished Parker and Ford, and I think it's clear that it distinguishs them on the basis of nexus, and the reason I think that's clear is that the Leonard F. case comes out shortly after Pallozzi where Leonard F. did not buy his insurance directly from the insurance company but the employer, and there the Second Circuit did follow Parker and Ford because the services were not of the place of public accommodation, the insurance agency. They were services of the employer which is not covered under Title 3.

You asked me a minute ago, and I should have mentioned this when you said what do we do about the fact that internet was in the future. It may have been foreseen, but it was in the future, and I would point out that the consequence of requiring that the place be physical and public eliminates not

only the internet it eliminates business that is conducted exclusively by phone, and that was clearly not Congress's intent. So if Congress intended to cover business by phone there's no conceivable reason why it should have excluded business by internet. Unless the Court has further questions --

THE COURT: No. That's fine.

MR. GOLDSTEIN: Thank you.

THE COURT: Okay. Any response?

MS. OUELLETTE KLAUSNER: So first I just want to point out that the -- I have not read the Direct Marketing Association case. Counsel sent me an e-mail while we were on our way out to lunch.

THE COURT: Well I didn't either, but I read a particular paragraph that Justice Kennedy wrote about the significance of the internet in today's world and how it really suggests to the Supreme Court that they should be reconsidering its impact in a number of areas.

MS. OUELLETTE KLAUSNER: I have not read it, but my understanding it's not an ADA case, but I'm not sure whether the Court would like us to address it. If so, I would like to submit a brief on it.

THE COURT: I don't think it's necessary. No.

MS. OUELLETTE KLAUSNER: So Plaintiffs argue that the statute ADA needs to be construed liberally and that the

Supreme Court has said that and that's true, but they have taken it too far. While Title 3 may need to be construed liberally it's very well established that a statute cannot be construed in a manner that doesn't give effect to every term in that statute. The important term here is place. So counsel has stated that well place --

THE COURT: What about the word public? I mean counsel has raised a question about public. I mean basically what you're suggesting is that it has to be a physical space but it also has to be open to the public.

MS. OUELLETTE KLAUSNER: Yes.

THE COURT: Where do you get that?

MS. OUELLETTE KLAUSNER: So there are several places. First of all, the statute only regulates entities, private entities that operate a place of public accommodation. It's not anyplace. It's not a business that operates any facility. It's a place of public accommodation. That's -- that's the premise of the statute and who it covers.

It also comes from the three reasons -- that's number one. Number two --

THE COURT: May I just go back to that? Just the word public accommodation you're suggesting is that has to be a physical structure which is open to the public.

MS. OUELLETTE KLAUSNER: Yes.

THE COURT: Judge Posner would suggest to you that

the internet may very well be public accommodation focusing more upon the service as well as opposed to the physical.

Now I appreciate the fact those are totally different approaches to public accommodation, but does the fact that there is that significant difference of view about what public accommodation means suggest that it is ambiguous and that therefore the Court should go to the next step of Congressional interpretation?

MS. OUELLETTE KLAUSNER: No. We submit that the statute is not ambiguous at all. When -- when you look -- this is the second point I was going to make, is that even Plaintiff's counsel can see you have to view the language of the statute in its context, and here in the 12 categories of public accommodations identified by Congress every single one of them is a public place of -- I'm sorry, a place that is open to the public, that's what they are, and the Second Circuit has endorsed the canon of, and I apologize if I mispronounce this, it's in latin, noscitur a sociis.

THE COURT: I think that's pretty good, but what I find really quite interesting is that I appreciate the fact that you're really focusing upon the physical structure and as reflected in those 12 different descriptions, but other judges have looked through that -- those 12 different descriptions and they have found not only evidence of physical structures but also services, and I was thinking I'm not sure whether it was

Judge Posner or Judge Ponsor, one or the other, focusing upon travel services as just an example of those descriptions reflecting both physical structure as well as services, and that therefore the definition of public accommodation according to them may be in the services being described.

MS. OUELLETTE KLAUSNER: Well I believe it was the Carparts query that focused on travel service.

THE COURT: I'm sorry. Right. They are blending together. Okay. All right. So what about that?

MS. OUELLETTE KLAUSNER: So -- but what the Carparts Court -- well, first of all, as I explained previously what the Carparts Court said there was guidance. I mean that's what the Court called it. The First Circuit said this is guidance. So they acknowledge that's dicta. It's not binding, but in any event they did go on to give a view, and they said here's a travel service, but what the First Circuit did not do is apply this latin doctrine that requires that a term is interpreted within the context of the accompanying words to avoid the giving of unintended breadth to the Acts of Congress.

THE COURT: They literally did just that. They went through the 12 different descriptions and they suggested that's not just a description of physical structures it's also a description of services, and that's what public accommodation meant I thought to them, and I thought the finding of the First Circuit was really you go to the nature of the service really.

MS. OUELLETTE KLAUSNER: The problem with going to the nature of the service is that it renders the word place superfluous. Place, and Your Honor correctly stated that what matters is what was the common and ordinary meaning of place at the time the statute was written, and Plaintiffs don't challenge the fact that one ordinary and plain meaning of the word place was a building or other site where people go to. There is nothing to suggest Congress meant anything other than that.

Yes, are there other dictionary definitions of the word place? Sure, but none of them make sense in the context of this statute and in the context of a statute that lists specific types of facilities that are public facilities.

The other reason why I used the word public is because that's the conclusion of multiple Circuit Courts. So you have in Ponsor, this is a panel of the Sixth Circuit, every judge on the Sixth Circuit saying, this is a quote, "every term listed in Section 121817 in subsection F is a physical place open to the public." That's what the Sixth Circuit said.

The Third Circuit said the same thing in the Ford case. The Ninth Circuit said the same thing in the wire case. All the items on this list have something in common. They are actual physical places where goods or services are open to the public. Scribd doesn't operate any physical place where goods or services are open to the public.

THE COURT: So there is clearly a difference of opinion, a Circuit split already existing between the First Circuit at a minimum, the Seventh Circuit as well, and then the Third, Sixth, and Eleventh, and Ninth.

MS. OUELLETTE KLAUSNER: Well there's not a Circuit split because the Seventh Circuit and the First Circuit what they said they said in dicta. So those courts did say something that's different from what the other courts have held when squarely presented was the issue, but I would submit there's not a Circuit split. There is a split between the District of Massachusetts which squarely addressed the issue and decided differently than every other court in the country that's considered this issue. If I can address another point?

THE COURT: Do you know what happened to Judge Ponsor's case, the Netflix case? It's 2012 so was it appealed?

MS. OUELLETTE KLAUSNER: No. Netflix settled the case.

THE COURT: Okay.

MS. OUELLETTE KLAUSNER: Which is unfortunate we don't have the benefit of the First Circuit weighing in on here.

Plaintiffs argue while Scribd does operate equipment and equipment falls within the definition of facilities, if I can just use their chart here, their quote from the statute, what the Department of Justice has said it's not just that a

business has to operate a facility or operate equipment. If it did, every single business in America would be covered by Title 3. That may be what Plaintiffs would like, but that's not what the statute says and that's not what the regulations say. It has to be a place of public accommodation, means a facility. So it has to be a facility. It has to be physical; somebody operating equipment or a building, but that facility has to fall within -- and fall within at least one of the 12 categories listed in the ADA.

It's -- there are two parts to the test. So it has to be a place, a facility, and it has to fall within one of those categories, and a subscription reading service, an online publisher doesn't fall within any of those categories. It hasn't for years.

THE COURT: Well -- but if -- I mean I don't want to take the position that they would -- as to how they would respond, but if they are basically -- basically suggesting the facility is not just a physical structure itself but includes equipment, as an example, you get the equipment which meets the first prong and then you get library services or all kinds of other broad definitions from some of those 12 listed examples and seems to be what they would be arguing.

MS. OUELLETTE KLAUSNER: Like I said it's the facility. So Scribd operates a computer service. Assuming -- I mean that's actually not an allegation of the complaint, but

let's assume that they do. So assuming that Scribd operates equipment so they are operating a facility as defined by the Department of Justice's regulations, but they have to fall within one of the 12 categories. Computers are not in hotels, restaurants. Computers are not libraries. Computers are not bakery or museums or parks.

THE COURT: No. They are the facility. What they are basically suggesting is the computer is the equipment; i.e. the facility, and based upon that they are providing library services because I mean essentially you're an online library, aren't you?

MS. OUELLETTE KLAUSNER: No. It's not a library. You don't check out books. You don't go in and peruse things. It is a -- the Plaintiffs in their complaint characterize it as a subscription reading service and an online publication platform.

THE COURT: Well okay. All right.

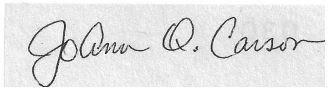
MS. OUELLETTE KLAUSNER: All right. Thank you.

THE COURT: Thank you. Okay. Thank you and appreciate very much your coming today and take it under advisement.

(Adjourned at 2:45 p.m.)

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



March 5, 2015

Date

JoAnn Q. Carson, RMR,CRR